Supreme Court, U.S.
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No. 99-1179

IN THE
SUPREME COURT OF THE UNITED STATES

POWER ENGINEERING COMPANY,
REDOUBT, LTD., and RICHARD J. LILIENTHAL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

JOHN J. ZODROW *
ZODROW *ET AL.* P.C.
INDEPENDENCE PLAZA
SUITE 1700
1050 SEVENTEENTH STREET
DENVER, CO 80265
(303) 572-0700

Counsel for Petitioners

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

ARGUMENT 1

CONCLUSION 6

TABLE OF OPINIONS

Cases

Dayton Board of Education v. Brinkman,
433 U.S. 406, 420 (1977) 5

Statutes

42 U.S.C. §6901 *et seq.* 1
42 U.S.C. §6925(a) 5
42 U.S.C. §6928(a) 1, 2, 5

Rules of Civil Procedure

Fed.R.Civ.P. 64 . . . . . 1, 4, 6

Regulations

6 C.C.R. 1007-3 265.112 3
6 C.C.R. 1007-3 265.118 3
6 C.C.R. 1007-3 Part 266 1
6 C.C.R. 1007-3 §266.12 3
6 C.C.R. 1007-3 §266.14 3

SUMMARY OF ARGUMENT

Elemental principles of statutory instruction issued by this Court prohibit the use of financial assurances described in 6 C.C.R. 1007-3, Part 266 as a substitute for the prejudgment remedies authorized by Rule 64 of the Federal Rules of Civil Procedure. Petitioners Power Engineering Company, Redoubt, Ltd. and Richard J. Lilienthal's compliance with the financial assurance requirements of 6 C.C.R. 1007-3, Part 266, in the specific context of this action has no purpose other than to provide prejudgment security guaranteeing Petitioners' compliance with a future District Court order. The labels applied to the mandatory relief granted by the District Court, and affirmed by the Court of Appeals, cannot and do not change its substance. The context of the District Court's mandatory injunctive order, the evidentiary basis for the District Court's finding of irreparable harm, the fact that compliance with the order does not bring Petitioners into compliance with the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901 *et seq.* or the State of Colorado's implementing regulations, and the lack of any remedial purpose other than to secure future compliance with an Order of that District Court collectively demonstrate that the mandatory injunctive order is not "appropriate relief" under RCRA's enforcement provision, 42 U.S.C. §6928(a).

ARGUMENT

Petitioners contend that the District Court and the Court of Appeals erred as a matter of law by holding that Petitioners must obtain financial assurances pursuant to 6 C.C.R. 1007-3, Part 266 because such financial assurances constitute a prejudgment remedy within the specific context of this action. Federal Rule of Civil Procedure 64 provides the

exclusive pre-judgment remedies for securing satisfaction of a judgment or order to be entered in a case. The United States concedes this legal point in its response brief, arguing instead that the financial assurances ordered by the District Court are intended to guarantee payment of closure and post-closure costs, and not as pre-judgment security for pre-closure remediation costs.

The Court of Appeals erred by interpreting the financial assurances ordered by the District Court as applying to closure and post-closure costs, and not as an order for pre-judgment security for pre-closure remediation. Appendix "App." A, pp.19a-20a. The United States defends this interpretation by asserting that the District Court granted "appropriate relief" authorized by 42 U.S.C. §6928(a) because the mandatory injunction directs that Petitioners provide financial assurances for closure and post-closure costs necessary to close Petitioners' facility, and is not intended as a prejudgment remedy guaranteeing (through a third party financial institution) Petitioners' payment of costs for pre-closure remediation of contaminated soils and groundwater described in the United States complaint. The Court of Appeals' interpretation and the United States' premise fail because the District Court's order is directed solely to pre-closure remediation of existing contamination, and has no purpose other than to guarantee performance of a future District Court order directing such remediation.

There is no support for the Court of Appeals interpretation of the District Court's order as applying to closure and post-closure costs. The District Court's Order and the Court of Appeals' opinion are not based upon the premise that Petitioners will cease operations after remediation is completed. Closure and post-closure plans address the need to treat and/or dispose of expected

contamination at the time the facility ceases operations, and are dependent upon the nature of the facility, its operations, and the nature and extent of wastes present at the facility during its expected life. 6 C.C.R. 1007-3,§ §265.112, 265.118. The amount of financial assurances to be obtained by a RCRA facility is dependent upon an estimate of costs necessary to implement closure and post-closure plans for the facility. 6 C.C.R. 1007-3, §§266.12-266.14. The District Court's order could not have been based upon a cost estimate for the implementation of closure and post-closure plans because no such plans were offered into evidence. App. D, p. 96a. The $3.5 million in financial assurances ordered by the District Court was based *solely* upon the estimated cost of pre-closure remediation of contaminated soils and groundwater described in the complaint. App. D, pp. 95a-97a.

The Court of Appeals erred by equating the amount of financial assurances ordered by the District Court with closure and post-closure costs. The record is devoid of any evidence tending to establish that the amount of financial assurances was based *in any part* on an estimate of closure and post-closure costs contemplated by 6 C.C.R. 1007-3, §§266.12-266.14. It necessarily follows that the purpose of the District Court's Order was to provide the United States with a prejudgment remedy securing Petitioners' compliance with a future Order directing pre-closure remediation of contaminated soils and groundwater described in the complaint, and was not intended for the implementation of closure and post-closure plans meeting the requirements of 6 C.C.R. 1007-3, §§265.112 and 265.118.

The Court of Appeals failed to acknowledge the significance of the District Court's reliance on evidence of PEC's limited financial resources, failure to pay the civil

penalty assessed by the State of Colorado, allegations of a pattern of debt reduction and asset forfeiture, and statements regarding bankruptcy and abandonment of the facility.[1] App. A, p. 20a. Had the United States merely sought an order directing financial assurances for closure and post-closure costs, the evidence at the hearing would have consisted solely of closure and post-closure plans or their equivalent, and cost estimates for the implementation of those plans. No such evidence was offered. App. D, p. 96a. Evidence inferring the possibility that Petitioners would be financially unable to comply with a future District Court order directing remediation of the property is irrelevant to RCRA's regulatory requirement that a facility prepare and maintain closure and post-closure plans, and obtain financial assurances based upon the cost of implementing such plans. The United States and the District Court proceeded on the basis that injunctive relief was necessary due to the threat of irreparable harm created by Petitioners' perceived inability to satisfy a future order or judgment entered in the action, the very harm Federal Rule of Civil Procedure 64 is intended to remedy. The Court of Appeals erred by ignoring the significance of the District Court's reliance on such evidence.

The District Court's order serves no regulatory purpose other than as a means to guarantee (through a third party financial institution) payment of costs associated with

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[1] Petitioners have spent over $ 600,000 to remediate contamination since the District Court entered its mandatory injunction. Petitioners have fully characterized the existing contamination and have implemented soils and groundwater remediation measures. Petitioners have not filed bankruptcy, have not abandoned the business or the property, and have not taken flight. In short, the irreparable harm envisioned by the United States was a mirage.

pre-closure remediation of contaminated soils and groundwater. The United States' contention that the District Court's Order directing that Petitioners obtain financial assurances is "appropriate relief" for a violation of any RCRA requirement is without merit. The mandatory injunction is based upon findings that Petitioners illegally stored, treated and disposed of hazardous waste without a permit in violation of 42 U.S.C. §6925(a). App. D, pp. 85a-90a. The United States fails to explain how relief which will not bring Petitioners into compliance with 42 U.S.C. §6925(a) is "appropriate relief."

A court must tailor a remedy to fit the nature and extent of a statutory violation, and give only such relief as is authorized by the statue. *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1977). Plucking the financial assurance requirements out of the regulations governing closure of RCRA facilities, to the exclusion of all other applicable regulations, has no purpose other than as a prejudgment remedy. Had the United States truly sought Petitioners' compliance with regulations governing closure and post-closure of a RCRA facility, the United States would have requested and the District Court would have entered an injunction directing that Petitioners prepare and provide the closure and post-closure plans, closure and post-closure cost estimates, and obtain financial assurances based upon such plans and estimates. Instead, the United States sought and the District Court ordered financial assurances to cover estimated costs for pre-closure remediation activities. In short, the mandatory injunctive relief is not "appropriate relief" under 42 U.S.C §6928(a) because it does not remedy the nature and extent of the violation on which it is based, *i.e.,* the failure to comply with regulations governing closure and post-closure of a RCRA facility.

Viewed as a whole, the entire foundation of the District Court's order demonstrates that it is, in reality, a prejudgment security remedy that far exceeds the scope of any such remedy available under Federal Rule of Civil Procedure 64. The mandatory injunction does not remedy Petitioners' operation of a RCRA facility without a permit, does not remedy Petitioners' lack of closure and post-closure plans, cost estimates and financial assurances for implementation of such plans, and is premised upon the District Court's belief that Petitioners will not be able to financially comply with a future order directing pre-closure remediation of the property. The mandatory relief ordered by the District Court and affirmed by the Court of Appeals has every hallmark of a prejudgment security remedy, and none of the hallmarks of a RCRA enforcement remedy directing that Petitioners come into compliance with the Colorado hazardous waste regulations applicable to them. The labels applied by the United States, by the District Court, and by the Court of Appeals, do not and cannot change the substance of the District Court's order.

CONCLUSION

The petition for writ of certiorari should be granted. Supreme Court guidance is necessary to prevent the imposition of financial assurances as a prejudgment remedy to secure satisfaction of a future judgment in excess of the standards applicable to prejudgment remedies governed by Federal Rule of Civil Procedure 64.